Date Issued: August 16, 1999

In the Matter of:	
WILLIE J. STEWARD	
Claimant	
v.	Case No. 1998-LHC-1179
	OWCP No. 06-162340
INGALLS SHIPBUILDING, INC.	
Employer	

APPEARANCES:

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For The Claimant

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For The Employer

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Willie J. Steward (Claimant) against Ingalls Shipbuilding, Inc. (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on February 3, 1999, in Gulfport, Mississippi. The hearing was continued to March 17, 1999 in Metairie, Louisiana for the purpose of gathering Employer's expert witness testimony. All parties were afforded a full

opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. This decision is based upon a full consideration of the entire record.[1] Claimant offered ten (10) exhibits while Employer proffered seventeen (17) exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.

Post-hearing briefs were received from Claimant and Employer. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Employer was notified of the injury on June 28, 1994 on Employer's LS-203; on June 30, 1993 based on Claimant's claim for compensation; and on December 22, 1994 by formal notice.[2]

2. That Employer filed Notices of Controversion on July 11, 1994, August 8, 1994 and February 4, 1998.

3. That Claimant's average weekly wage at the time of injury was $320.00.

II. ISSUES

The unresolved issues presented by the parties are:

1. Statute of limitations.

2. Causation and fact of injury.

3. The nature and extent of Claimant's disability.

4. Effect of Section 933 on claim.

5. Attorney's fees, penalties and interest.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; and Employer Exhibits: EX-___; and Joint Exhibit: JX-___.

[2] It should be noted that the Employer's First Report of Injury lists the date of injury as July 6, 1994. (EX-2).

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

At the time of the hearing, Claimant was 76 years old and had a fifth grade education. (Tr. 27). He worked for his father and was then enlisted with the Army, with which he served for 27 years. (Tr. 28). He did not use any air-driven pneumatic or vibrating tools while in the Army. Id. He was discharged on July 1, 1970. (Tr. 29). Claimant subsequently began working for Employer on October 16, 1973 and stayed through September 16, 1981. (Tr. 30). After 1981, Claimant worked for Chicago Bridge and Iron and testified that he did not use vibratory tools during that employment period. (Tr. 31).

Claimant testified that he was diagnosed with diabetes and high blood pressure in 1983. Id. He further stated that he was treated for it at the VA Hospital in Biloxi, Mississippi. (Tr. 32).

Claimant was originally hired by Employer in the "27 Department," which is the paint department. Id. He testified that using vibratory tools never caused him to miss work or change jobs. Id. Claimant also stated that during the period of employment with Employer, he used vibratory tools, including needle guns, rust machines, vertical grinders and chipping hammers. (Tr. 32-33). He estimated that he used vibratory tools about 50% of the time he was employed. (Tr. 34).

Claimant testified that the longest continuous period of time he used a chipping hammer was about two or three hours. (Tr 38). He also stated that he used this particular tool overhead, as well as in a kneeling position. (Tr. 38-39). With respect to needle guns, Claimant testified that he used these tools overhead and while standing or kneeling. (Tr. 40-41). He claimed that depending on the size of room on which he was working, he might use a needle gun from one-half of the day to the whole day. (Tr. 43). Claimant testified that he used grinders overhead, on the floor, while standing and sitting and in close spaces. (Tr. 44). He believed the grinder caused the most vibration. (Tr. 46). Furthermore, he stated that he used each of these types of tools equally. (Tr. 47).

Claimant testified that about two years after he began working for Employer he started to feel pain in the his hands and wrists. Id. He did not seek medical treatment for his pain, nor did he go to the hospital. (Tr. 48). After he left Employer's facility, he continued to experience hand, wrist and arm problems, particularly with the "change of weather." Id. Claimant testified that about

five years prior to the hearing, in 1993, he began experiencing numbness and swelling in his hands and wrists. (Tr. 49). He currently experiences numbness and tingling. Id.

He further claimed that after he left Employer's facility, he never used any type of vibrating tools. Id. Claimant also stated that the tools shown on videotape (CX-10) were depicted fairly and accurately as he used them in the course of his work at Employer's facility. (Tr. 52).

On cross-examination, Claimant reaffirmed his employment periods. (Tr. 58-59). While employed in the paint department, his principal duties were painting with a brush, which he admitted did not vibrate. (Tr. 59-60). He admitted that he never worked in the grinding or sheet metal chipping department, which he explained used chippers, grinders and needle guns frequently. (Tr. 60-61).

Claimant retired in 1983. (Tr. 62). He stated that if Employer had gloves available, he used them while using vibratory tools. Id. He explained that about two years after beginning work for Employer, he began to feel numbness and pain in his wrists and hands. (Tr. 65). He attributed this symptomatology to "working with them tools there" (referring to the vibratory tools presented at the hearing). Id. He testified that he became aware that this symptomatology was caused each time he used the vibratory tools. (Tr. 66). He continued to experience the same problems whenever he used vibratory tools. Id. Claimant stated that he was not aware that the vibratory tools caused his problems until years later. Id.

Claimant sought medical attention in 1994 when he was examined at Diagnostic Services at the behest of his attorney. (Tr. 67). He was unable to recall which physician examined him. (Tr. 69). Claimant testified that he has treated with Dr. Wiggins. Id. Claimant was also evaluated in New Orleans, although he could not remember who examined him. (Tr. 70). He recalled that during the New Orleans evaluation, he underwent tests all day. Id.

Claimant testified that he has been an insulin-dependent diabetic since 1983. (Tr. 71). He reaffirmed that he suffers from high blood pressure, for which he takes medication. (Tr. 72).

The Medical Evidence

Chris E. Wiggins, M.D.

Dr. Wiggins, board-certified in orthopaedic surgery, examined Claimant on August 22, 1994, at which time Dr. Wiggins, along with his partner, Dr. John W. Cope, performed a comprehensive neurovascular assessment of his hands. (CX-8, pp. 1-2; CX-3). The assessment consisted of an initial examination by a general practitioner where a history was taken, nerve conduction

velocities, current perception threshold, vibrometry and cold water immersion tests. (CX-8, p. 2). He stated in his affidavit that his diagnosis was made based on the combination of Claimant's history, physical examination and objective lab studies. (CX-8, p. 6).

Dr. Wiggins reported that Claimant had been exposed to vibratory tools for approximately seven years as a shipyard painter. (CX-8, ex. 2, p. 4). Following the examination, he diagnosed Claimant with "bilateral HAVS with diabetes mellitus." Id. Dr. Wiggins further noted that Claimant's neurological impairment is "Grade 3SN, bilateral"[3] and his vascular study/rating is "3 bilateral."[4] Id.

In his affidavit of January 25, 1999, Dr. Wiggins additionally diagnosed Claimant with bilateral CTS. (CX-8, p. 7). It should be noted that Claimant had not been evaluated or treated by Dr. Wiggins since August 2, 1994. He further opined that based on medical reasonable probability, Claimant's use of vibratory tools during shipyard work caused or contributed to his CTS and HAVS and that "there is likely little medical treatment that is indicated for the HAVS condition, except over the counter medications at this time." (CX-8, p. 7). Additionally, he stated that as a consequence of HAVS, Claimant has a 15% permanent partial impairment rating to the right upper extremity and a 15% permanent partial impairment rating to the left upper extremity. (CX-8, p. 8).

Harold M. Stokes, M.D.

Dr. Stokes is board-certified in orthopaedic surgery and holds a subspecialty training certificate and fellowship in hand surgery. (Tr. 85; EX-13). He has practiced orthopaedic surgery for 26 years and since 1989, Dr. Stokes has limited his practice to hand surgery. (Tr. 86-87). Prior to 1989, Dr. Stokes devoted about 70% to hand surgery practice. (Tr. 87). He currently carries staff privileges at East Jefferson General Hospital, Kenner Regional Hospital, Doctors Hospital of Jefferson, Memorial Medical Center, Charity Hospital and Children's Hospital. (Tr. 88). Additionally, he and Dr. George own a private practice called Hand Surgical Associates, which is located in Metairie, Louisiana. Id.

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[3] Dr. Wiggins explained that "3SN" meant that the nerve conduction studies were abnormal and moderate to severe sensorineural changes were present.

[4] Dr. Wiggins further explained that vascular stage of "3" is bilateral, "meaning to both hands, and meaning moderate to severe vascular changes."

Claimant was examined by Dr. Stokes on November 14, 1998 at his private facility in Metairie, at which time Claimant underwent a full day of testing. Id. Dr. Stokes explained that there were six separate sections through which Claimant would rotate: a history and clinical examination station; a radiology station; a grip strength evaluation station; a neurology station; a vascular laboratory station; and a summary station. (Tr. 89; EX-12). Dr. Stokes testified that he was directly responsible for the history and clinical examination and the summary stations. (Tr. 90). With respect to the other stations, Dr. Stokes oversaw other certified hand therapists whose practice is limited to evaluations and occupational therapy treatment for the hand. (Tr. 91). Dr. Stokes further explained that the vascular station was manned by Dr. George and the neurology station was manned by Dr. Hugh Fleming, a board-certified neurologist. Id.

Dr. Stokes testified that his testing protocol was designed to establish whether Claimant suffered from HAVS or carpal tunnel syndrome (CTS) or any other malady of the hands or upper extremities. (Tr. 92-93). The evaluation was performed over the course of the day. (Tr. 97).

Dr. Stokes opined that based upon a reasonable medical probability, the evaluation and testing of Claimant, and his background, training and experience as a hand specialist, there was no evidence of HAVS. (Tr. 98). Dr. Stokes, however, found a history of multiple medical problems, including insulin-dependent diabetes. Id. Claimant also had a history of renal disease, asbestosis and hypertension, for which he took medication. Id. Dr. Stokes testified that the electrodiagnostic studies were consistent with a moderate underlying diabetic neuropathy, which he opined accounted for the majority of Claimant's symptoms. Id. The studies further showed objective signs consistent with carpal tunnel syndrome. (Tr. 99). No other abnormality or denervation were noted. Id.

The vascular studies were also reported as normal with no evidence of HAVS. Id. Dr. Stokes concluded that Claimant is an insulin-dependent diabetic with diabetic neuropathy with findings consistent for moderate bilateral carpal tunnel syndrome and no evidence whatsoever of HAVS. Id. Claimant related to Dr. Stokes that he last worked for Employer in 1984 and began to experience symptomatology of carpal tunnel syndrome in or around 1994 or 1995. Id. Dr. Stokes opined that Claimant's moderate bilateral carpal tunnel syndrome is not related to his employment with Employer. (Tr. 100). Rather, he attributes Claimant's symptomatology to his diabetes. Id. He additionally stated that there is no reasonable basis under any recognized diagnostic medical criteria to conclude that Claimant has HAVS. (Tr. 101). Although he does not believe the carpal tunnel condition is related to Claimant's employment, Dr. Stokes would nevertheless assign a 5% impairment rating to each upper extremity. Id. Dr. Stokes reviewed Dr. Wiggins' 1994

medical records, in which a diagnosis of carpal tunnel syndrome is not made. Id. Dr. Stokes opined that based on reasonable medical probability, Claimant's moderate bilateral CTS is not employment-related. (Tr. 102).

On cross-examination, Dr. Stokes testified that his clinic treats workers' compensation claim patients who are referred by hospitals, employer's safety officers, other physicians, attorneys and insurance companies. (Tr. 103). He estimated that 70% of the attorney referrals come from defense attorneys. (Tr. 105).

On the date that Claimant was tested in the clinic, Dr. Stokes estimated that he saw about eight to twelve other patients. Id. He could not recall the exact amount of time spent with Claimant. Id. Dr. Stokes explained that in addition to his own findings, he relied on certified hand therapists' and Dr. Fleming's objective findings in reaching his final conclusions that Claimant did not have HAVS. (Tr. 108). He assumed Dr. Fleming knew about Claimant's work history and use of vibratory tools. (Tr. 111). Dr. Stokes explained that Dr. Fleming's opinion that Claimant's symptomatology is brought on by his diabetic neuropathy did not depend on whether he knew Claimant's work history. (Tr. 111-112). Rather, he stated that there were specific findings on the electrodiagnostic tests which pointed to neuropathy. (Tr. 112).

Dr. Stokes definitively ruled out Claimant's work activity as the cause of his symptomatology because "his symptoms didn't start until ten years after he stopped working." (Tr. 113). Dr. Stokes opined that with vibration-induced carpal tunnel syndrome, the symptomatology will occur at the time the tools are used, not ten years after an employee stops working. Id.

He testified that his clinic has diagnosed patients with HAVS and further explained HAVS is not a very common condition. (Tr. 114).

In his evaluations, Dr. Stokes considered how long Claimant used vibratory tools. (Tr. 120). He stated that Claimant's history of asbestosis has no effect on his symptomatology. (Tr. 121). Dr. Stoke further testified that based on a reasonable degree of medical certainty, Claimant's bilateral CTS was not work-related. Id.

Dr. Stokes testified that he has reviewed various literature regarding HAVS, including the NIOSH standards. (Tr. 124). Although he has never published any articles on HAVS, he has published articles on CTS. (Tr. 125). Dr. Stokes is currently researching CTS as it relates to the use of vibratory tools for a future article. Id.

Eric R. George, M.D.

Dr. George is board-certified in plastic and reconstructive surgery and completed a fellowship in microsurgery of the hand, which required vascular and microvascular training. (Tr. 129-131; EX-14). His practice has been limited to hand surgery since 1994. (Tr. 132).

Dr. George was responsible for the vascular testing and cold challenge testing of Claimant's upper extremities. (Tr. 131). He explained that the vascular testing included information regarding demographics, cardiovascular history, smoking history, systolic blood pressures and segmental pressures testing. (Tr. 133). Additionally, a Doppler ultrasound, triphasic, monophasic and stenotic studies and a photoplethysmography were performed. Id. Finally, Claimant underwent a cold provocation test and a long exposure test. (Tr. 134).

Dr. George testified that Claimant had normal vascular studies and that based on reasonable medical probability, there was no evidence of HAVS, nor did the results of the vascular test suggest that he had HAVS. (Tr. 135; EX-12, pp. 8-14). Furthermore, the vascular and other studies failed to show any evidence of finger blanching or vasospasm. Id. Dr. George opined that Claimant did not have HAVS. (Tr. 136). With respect to Dr. Fleming's findings, Dr. George testified that the EMG and nerve conduction studies showed moderate diabetic neuropathy and moderate bilateral carpal tunnel syndrome. (Tr. 137).

On cross-examination, Dr. George testified performing a nerve conduction study on the lower extremity is more commonly performed with neuropathy of unknown etiology. (Tr. 138). He explained that with diabetic neuropathy, a classic pattern of nerve disease appears on the oscilliscope. (Tr. 137). Dr. George also explained that Claimant's CTS was consistent with diabetic neuropathy. (Tr. 139).

Dr. George also testified that he reviewed Dr. Stokes' summary of the medical records. (Tr. 140). He attributed the contradictory findings of Dr. Wiggins to the type of equipment used during testing, stating that Dr. Stokes and he have "a much more sophisticated way of testing this condition." (Tr. 141).

On re-direct examination, Dr. George opined that Claimant's CTS is related to his diabetic condition. (Tr. 150).

The Contentions of the Parties

Claimant contends that as a result of long-term cumulative use of vibratory tools at Employer's facility, he has suffered from hand-arm vibration syndrome (HAVS) or vibration-induced carpal tunnel syndrome (CTS). It is further alleged that the medical

evidence of Dr. Wiggins unequivocally supports a finding of HAVS or CTS. Claimant also argues that the statute of limitations should have begun to run on August 2, 1994, after the examination by Dr. Wiggins, at which time he alleged that he became aware of his disability, or on May 25, 1995, the date on which Dr. Wiggins issued his medical report assigning impairment ratings.

Employer, on the other hand, argues that the medical opinions of Drs. Stokes and George are reliably supported by objective medical data and years of clinical experience in the diagnosis and treatment of patients with hand problems. It is further alleged that the evidence establishes that Claimant does not suffer from HAVS or vibration-induced CTS. Thus, Employer has not incurred any liability to Claimant and Claimant's claim should be denied. It is further contended by Employer that Claimant has failed to meet the requirements of either Sections 12(a) or 13(a) with respect to the statute of limitations and his claim should therefore be denied.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. V. Vozzolo, Inc. v. Britton, 377 F. 2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 661 F. 2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. The Disease or Injury

A brief discussion of HAVS and carpal tunnel syndrome (CTS) is necessary.[5] HAVS is a relatively new type of claim, and although

[5] The majority of this HAVS and CTS information is borrowed from Morgan v. Ingalls Shipbuilding, Inc., 29 BRBS 508 (ALJ) (August 25, 1995). HAVS was first recognized and discussed by the National Institute for Occupational Safety and Health (NIOSH)

HAVS has been recognized for some time in Canada and England, and perhaps other European countries, it was not until 1989 that the National Institute for Occupational Safety and Health (NIOSH), an agency of the United States Department of Health and Human Services, published criteria for recognizing and reducing the risk of occupational exposure to hand-arm vibration. See generally CX-1.

NIOSH defines HAVS as a "chronic, progressive disorder with a latency period that may vary from a few months to several years." (CX-1, p. 32). The most common health problems associated with the occupational use of vibrating tools are signs and symptoms of peripheral vascular and peripheral neural disorders of the arms, hands and fingers. These signs and symptoms, some of which are shared with other repetitive-strain phenomenon, include tingling, numbness, pain and blanching of the fingers, loss of grip strength, reduction in finger dexterity, and sometimes sleep disturbances at night. Id. This composite of signs and symptoms has also been called "vibration white finger" disease, cumulative trauma disorder and Raynaud's phenomenon.

NIOSH estimates that, on average, almost one-half of all workers who routinely use vibrating tools will develop HAVS. Id. This figure falls within the pervasiveness of all repetitive-strain injuries, which the Occupational Safety and Health Administration (OSHA) recently estimated account for 60% of all workplace illness. See Newsweek, June 26, 1995. Development of the disease depends upon a number of factors, most important of which are the amount of vibration (level of acceleration) of the tool, daily and cumulative toll usage, ergonomics of tool use (how the tool is held) and latency period (time between exposure and first signs or symptoms). (CX-1, p. 32).

HAVS is often mistaken for CTS (and vice versa) although the actual damage wrought by the two is thought to be different. CTS causes neuropathy of the median nerve in the wrist; inflammation due to excessive or awkward use of the hands and arms; fluid build-up; and swelling of the tissues and tendons inside the carpal tunnel. In contrast, HAVS appears to affect the peripheral nerves and vascular systems directly. Snowden, supra at 2. Additionally, the treatment options between HAVS and CTS differ: for HAVS patients, there is no known treatment (other than to remove the worker from the injurious stimuli of the workplace to ease painful symptoms), but for CTS patients, surgical intervention has relieved pain. Id. Surgery usually provides little relief to true HAVS

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in September 1989 (Publication No. 89-106), the original source of much of the information presented in Morgan. The NIOSH report is included in Claimant's exhibits. See CX-1. See also Snowden v. Ingalls Shipbuilding, Inc., Case No. 1998-LHC-1164 (June 17, 1999) (unpublished).

patients, as surgery cannot restore damaged peripheral nerve fibers. Id.

No single test is sufficient for a HAVS diagnosis, as not all patients exhibit all symptoms. (CX-1, p. 90). Instead, diagnosis is usually based on a combination of positive test results and employment history. Several tests can be used to help substantiate a clinical diagnosis of HAVS. Principal among these tests are cold provocation, finger plethysmography, aesthesiometry, grip force, nerve conduction and sensory acuity. (CX-1, pp. 90-96).

B. Is HAVS an Injury or Disease?

Section 2 of the Act, in pertinent part, defines "injury" as "...such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury..." 33 U.S.C. § 902(2). Professor Arthur Larson points out two crucial points of distinction between accidents and occupational diseases the latter of which is reflected in part as: (1) an inherent hazard from continued exposure to conditions of a particular employment; and (2) a gradual, rather than sudden, onset.[6]

The Second Circuit has defined occupational disease as requiring the satisfaction of three elements: (1) the employee must suffer from a disease (as opposed to a traumatic injury); (2) hazardous conditions surrounding the employment must be of such nature as to cause the disease (coal dust, asbestos, radiation, etc.); and (3) the conditions must be peculiar to the specific occupation, as opposed to employment in general. Grain Handling v. Sweeney, 102 F.2d 464, 465 (2d Cir. 1939), cert. denied, 308 U.S. 570 (1939); see also LeBlanc v. Cooper/T. Smith Stevedoring, Inc., 130 F.3d 157, 159 (5th Cir. 1997); Castorina v. Lykes Bros. S.S. Co., Inc., 758 F.2d 1025, 1030 (5th Cir. 1985).

Although it could be argued that HAVS results from a traumatic injury, I find that based upon the information in the NIOSH report, it is more reasonable to conclude that it is a disease caused by repetitive injurious vibrations. Hand problems have been considered both an occupational disease and an injury, depending upon whether the problem arose from a single violent episode or repetitive trauma. See e.g., Johnson v. Director, OWCP, 911 F.2d 247 (9th Cir. 1990); Morgan supra, n. 5. However, unlike carpal tunnel syndrome, according to the well-reasoned and credible medical opinions presented in this matter, HAVS develops as a result of long-term exposure with a significant delay between the exposure and onset. Thus, I find and conclude that HAVS should be classified as a disease, which satisfies the first requirement of the Second Circuit test.

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[6] A. Larson, Workmen's Compensation Law, § 41.31 (1993).

Furthermore, HAVS has been recognized as a disease in official government reports, such as the NIOSH report (CX-1), and other publications which document that the continued and prolonged use of vibratory tools may be hazardous to a person's upper extremities. Therefore, the second requirement has been met.

Finally, the third requirement is met as well. Conditions, such as using vibratory tools, which give rise to HAVS are present in numerous occupations, such as shipyard work, in which such tools are used, but are not present in all employment. Claimant credibly testified that vibratory tools are commonly used in shipyard employment. He further testified that he did not use such tools during work periods other than that pertaining to shipyard work. Thus, having met the criteria of Professor Larson and the Second Circuit, I find that in this particular instance, HAVS is an industrial, or occupational, disease, rather than an episodic event.

B. Statute of Limitations

Having found HAVS is an occupational disease, I will consider whether Claimant gave timely notice of his disease and subsequently filed his claim in a timely manner.

In the case of an occupational disease which does not immediately result in disability or death, notice must be given within one year after the employee or claimant becomes aware or in the exercise of reasonable diligence or by reason of medical advice, should have been aware of the relationship between the employment, the disease **and** the disability. 33 U.S.C. § 912. Thus, the period does not begin to run until the employee is disabled, or in the case of a retired employee, until a permanent impairment exists. It is the claimant's burden to establish timely notice.

The trier of fact must determine the date on which the claimant became aware of, or should have become aware of, the relationship between the disease, the employment and the disability. Martin v. Kaiser Co., 24 BRBS 112 (1990); Horton v. General Dynamics Corp., 20 BRBS 99 (1987).

Additionally, Section 13(b)(2), as amended in 1984, states that a claim for disability due to an occupational disease which does not immediately result in disability or death, will be timely filed within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence, or by reason of medical advice, should have been aware of the relationship between the employment, the disease and the disability, or within one year from the date of the last payment of compensation, which ever is later.

1. Notice

As noted hereinabove, notice must be given within one year after Claimant becomes aware or in the exercise of reasonable diligence or by reason of medical advice, should have been aware of the relationship between his employment **and** the alleged injury. Based on the credible testimony of Claimant, I find and conclude that Claimant gave timely notice to Employer of the relationship between his employment and his injury.

Claimant was originally hired in 1973 by Employer to work in the paint department. He testified that using vibratory tools never caused him to miss work or change jobs, nor did he ever seek medical treatment or go to the hospital for his pain. He attributed this symptomatology to using vibratory tools and further testified that he became aware that this symptomatology was caused each time he used the vibratory tools.

Employer argues that Claimant testified he began to experience symptomatology approximately two years after commencement of employment with Employer, placing the date of onset at approximately 1975. However, I find that although Claimant was obviously aware that his hands and arms would tingle or become numb whenever he used vibratory tools for a period of time, there is no evidence that he should have known that the vibration was what was actually causing the injury until advised of such by Dr. Wiggins on August 2, 1994, or alternately, by Dr. Wiggins' report of May 25, 1995 assigning impairment ratings.

Furthermore, Claimant did not associate his symptomatology while using vibratory tools with any impairment of earning capacity, as evidenced by his testimony that he never lost any work time due to such symptoms. (Tr. 32). I find that Claimant did not even appreciate the true nature of his condition until August 2, 1994 when examined by Dr. Wiggins or May 25, 1995, when Dr. Wiggins assigned impairment ratings. Thus, I find and conclude that Claimant's knowledge of the connection between his use of vibratory tools and symptomatology did not trigger the awareness provision of Section 12 because he did not believe that he had an impairment. See Leathers v. Bath Iron Works Corp., 135 F.3d 78 (1st Cir. 1998); Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988); Lindsay v. Bethlehem Steel Corp., 18 BRBS 20 (1986).

Employer first knew of Claimant's injury on July 6, 1994. (EX-2). Claimant arguably reported the date of accident as September 15, 1981. (EX-2; EX-3). However, I find Claimant learned of the relationship between his injury, employment **and** disability on either August 2, 1994 or May 25, 1995. Thus, at the earliest, Claimant knew of the relationship between his injury, employment **and** disability, on August 2, 1994 when examined by Dr. Wiggins or May 25, 1995, when Dr. Wiggins assigned impairment

ratings. Therefore, the notice period began to run on either August 2, 1994 and tolled August 2, 1995. Alternately, the period began to run on May 25, 1995 and tolled on May 25, 1996. Because Claimant notified Employer prior to the dates on which the period tolled, Claimant's notice to Employer is deemed timely and on these grounds, his claim should not be denied.

2. Filing Period

Having found that Claimant provided timely notice to Employer, the inquiry moves to whether Claimant timely filed his claim for compensation. I find that based on the evidence of record, Claimant filed his claim in a timely manner.

The record evidence shows that Claimant's claim for compensation was filed on June 28, 1994. (EX-1). The LS-203 form indicates that the date of Claimant's injury was June 30, 1993. Id. Thus, the statute of limitations for the filing period began to run on June 30, 1993 and tolled two years later, in accordance with the Act, on June 30, 1995. Because Claimant filed his claim for compensation on June 28, 1994, the claim was clearly filed in a timely manner. Accordingly, Claimant's claim for compensation is not time-barred.

C. Compensable Injury/Disease

Having concluded that Claimant's notice and filing of claim were timely, a consideration of the substantive merits of Claimant's case is undertaken hereinbelow.

As previously noted, Section 2 of the Act, in pertinent part, defines "injury" as "...such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury..." 33 U.S.C. § 902(2). A presumption that an injury arose out of employment arises once a claimant establishes a prima facie claim for compensation. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). In order to establish a prima facie claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that he sustained physical harm or pain and that an accident occurred in the course of employment, or that conditions existed at the workplace which could have caused the harm or pain. Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984); Kelaita v. Triple A. Mach. Shop, 13 BRBS 326 (1981), aff'd sub nom., Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990).

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm

necessary for a prima facie case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982).

1. Physical Harm or Pain

In the present case, Claimant credibly testified that he suffers from numbness and tingling in his hands. (Tr. 49). Additionally, the medical evidence of record establishes that Claimant was examined and evaluated for this symptomatology by Drs. Wiggins, Stokes, George and Fleming.

Moreover, Dr. Wiggins, who evaluated Claimant in 1994 originally diagnosed Claimant with HAVS. (CX-5). In his January 1999 affidavit, he additionally found that Claimant suffered from moderate bilateral carpal tunnel syndrome as a result of long-term vibratory tool use. (CX-8).

Given the liberal construction of the Act, the credible testimony of Claimant and the medical evidence of record, a finding that Claimant incurred a physical harm or pain which could be related to his employment is supported by the instant record. Thus, I find that Claimant has shown that he suffered a harm or pain and has consequently met the first element of a prima facie claim for compensation.

2. Accident or Conditions At Workplace

In addition to meeting the first element of a prima facie claim, Claimant must also show that an accident at work or conditions in his workplace could have caused the harm. Kier, supra.

The injury alleged in this case is that Claimant has HAVS or vibration-induced carpal tunnel syndrome, which he further contends was the result of long-term vibratory tool use at Employer's facility. At the hearing, Claimant credibly testified he used vibratory tools, including needle guns, rust machines, vertical grinders and chipping hammers. (Tr. 32-33). He estimated that he used vibratory tools about 50% of the time he was employed. (Tr. 34). Furthermore, a videotape was presented at the hearing which showed these specific vibratory tools being used on steel surfaces in a shipyard setting, which Claimant testified was an accurate and fair portrayal of the type of work he performed on similar surfaces with similar tools.

In light of the foregoing, I find that a preponderance of the testimonial evidence establishes that conditions in Claimant's workplace existed which could have caused Claimant's harm or pain. Accordingly, Claimant has shown a prima facie claim for compensation.

3. Employer's Rebuttal Evidence

If the claimant has shown a prima facie claim for a compensable injury, a presumption arises that the injury arose out of the course of his employment. Lacy v. Four Corners Pipe Line, 17 BRBS 139 (1985). This is, however, a rebuttable presumption which the employer can rebut by presenting substantial evidence that the injury was not employment related. 33 U.S.C. § 902(2); see also Sam v. Loffland Bros. Co., 19 BRBS 228, 231 (1987).

In light of the medical evidence presented by the parties, I find and conclude that the record does not establish a causal connection between Claimant's alleged injury (HAVS or vibration-induced carpal tunnel syndrome) and disability and his employment, during which he allegedly used vibratory tools. Moreover, the medical evidence fails to establish the existence of HAVS, but rather, supports a conclusion that Claimant does not suffer from hand-arm vibration syndrome whatsoever. Additionally, although the medical evidence of record establishes that Claimant suffers from CTS, such condition is the result of diabetic neuropathy and not due to the long-term use of vibratory tools. Thus, I find and conclude for the following reasons that Employer has rebutted Claimant's prima facie case.

Dr. Wiggins, a board-certified orthopaedist who has no subspecialty in hand assessments, originally diagnosed Claimant with HAVS. (CX-5). In 1999, he stated in his affidavit that Claimant had moderate bilateral CTS. (CX-8, p. 7). It should be noted that Claimant had not followed-up with Dr. Wiggins since August 2, 1994. Dr. Wiggins' test assessment consisted of nerve conduction studies, perception threshold, vibrometry and cold water immersion tests. (CX-8). Dr. Wiggins also took a history of Claimant, which presumed Claimant used vibratory tools at Employer's facility from 1973 through 1981. His diagnosis was based on this history, the physical exam and the test results, as noted in his affidavit and attached report. (CX-8, ex. 2).

Drs. Stokes, George and Fleming, on the other hand, personally evaluated Claimant on November 14, 1998 and oversaw the testing protocol. (EX-12). During the evaluation, Claimant underwent six separate testing stations, which were manned by Drs. Stokes, George or Fleming and conducted by certified hand therapists. Based on the history, physical exam and test results, Dr. Stokes concluded that there was no evidence of HAVS or vibration-induced carpal tunnel syndrome. (Tr. 98-101; 121).

Upon review of all of the medical evidence of record, I find Drs. Stokes and George's medical opinions warrant greater probative weight than Dr. Wiggins. I further find and conclude that Claimant does not have HAVS or vibration-induced CTS for purposes of disability compensation. I accord greater probative weight to Drs.

Stokes and George for the following reasons:

First, Drs. Stokes and George have exceptional qualifications. Dr. Stokes, board-certified in orthopaedics, has practiced for 26 years and has limited his practice to hand surgery since 1989. (EX-13). Dr. George is trained as a vascular surgeon and holds a board-certification in plastic and reconstructive surgery. (EX-14). His specialty lies in surgery and microsurgery of the hand. Id. Dr. George also completed a hand fellowship and a sub-specialty in hand and upper extremity reconstruction. Id. Additionally, Dr. Fleming, who manned the neurologic portion of the test assessment, is a board-certified neurologist and a clinical instructor of Neurology at LSU Medical School. (EX-15).

Dr. Wiggins, on the other hand, does not hold the same qualifications in hand surgery and practice as does Drs. Stokes and George. (CX-3). On this basis, I do not find that Dr. Wiggins' medical opinions warrant more probative value than Drs. Stokes and George, who are clearly more qualified in the hand and upper extremity areas. Moreover, Dr. Wiggins additionally diagnosed Claimant with bilateral vibration-induced CTS, as noted in his January 1999 affidavit. (CX-8, p. 7). However, I accord less probative weight to Dr. Wiggins' medical opinion in light of the fact that Claimant had not been examined or evaluated by him since August 2, 1994, at which time he was not so diagnosed.

Second, Drs. Stokes and George were personally involved in the testing, which lasted almost the whole day. Their detailed report provided well-reasoned and persuasive opinions and conclusions about Claimant's condition and the non-existence of HAVS and vibration-induced CTS. (EX-12).

Moreover, the testing procedures performed by Drs. Stokes and George provided a more in-depth and detailed analysis in determining whether Claimant suffered from HAVS or vibration-induced CTS. As noted hereinabove, the NIOSH report suggests the following tests be performed to determine the existence of HAVS: cold provocation, finger plethysmography, aesthesiometry, grip force, nerve conduction and sensory acuity tests. Dr. Stokes' assessment involved each of the aforementioned tests. (EX-12). Dr. Wiggins' test assessment did not utilize each procedure recommended in the NIOSH report. (CX-5).

Beginning with the history, Dr. Stokes recorded that Claimant worked for Employer for nine and a half years as a rust machine operator. (EX-12, p. 1). Claimant reported no previous problems until 1994 or 1995 when his hands began to swell and he experienced pain and numbness. Id. At the direction of Dr. George, Claimant underwent a cold provocation test, a photo plethysmography test and Doppler Flow Study, which were performed to determine whether there was blood flow to Claimant's digits. (EX-12, pp. 11-14). These exams resulted normally. Claimant also underwent EMG and nerve

conduction studies, which indicated moderate underlying diabetic neuropathy. (EX-12, p. 2). Dr. Fleming further opined that the diabetic neuropathy might account for the majority of Claimant's symptoms. Id. The x-rays revealed no abnormalities. (EX-12, p. 5). Finally, grip strength was measured as well. (EX-12, pp. 8-10). In light of all the tests performed, it is clear that Drs. Stokes and George were thorough and their well-reasoned medical opinions and conclusions were based on objective data and findings.

Finally, with respect to Dr. Wiggins' testing procedures, he conducted a physical exam, nerve conduction studies, sensorineural tests, vibration tests and a cold water immersion test. (CX-6, ex. 2). Although these tests, on their face, appear to be acceptable in determining whether a patient has HAVS, the testing protocol of Drs. Stokes and George provided a more in-depth and detailed analysis of the various conditions associated with making a determination of HAVS: the vascular, sensory and musculo-skeletal conditions of Claimant. (EX-12). Dr. George took a vascular history, a smoking history, blood pressure studies and conducted multiple vascular tests in assessing Claimant's condition. Dr. Fleming performed an EMG and nerve conduction studies during the sensorineural testing portion. Tests performed in the musculo-skeletal assessment included the grip testing and range of motion testing. Additionally, an initial physical exam was performed and a summary station was established where Claimant returned to Dr. Stokes for a review of the test results. In light of the foregoing, I find Drs. Stokes and George's opinions and conclusions are more persuasive based on the more comprehensive test assessment. Therefore, I find and conclude that the well-founded opinions of Drs. Stokes and George clearly establish that Claimant does not have HAVS or vibration-induced CTS. Thus, Employer has been successful in rebutting Claimant's prima facie claim for compensation by presenting **specific and comprehensive medical evidence** establishing the non-existence of HAVS and vibration-induced CTS.

4. Causation

If the presumption is rebutted, the administrative law judge must weigh all of the evidence contained in the record and resolve the causation issue based on the record as a whole. See Devine v. Atlantic Container Lines, G.I.E., 23 BRBS 279 (1990); Director, OWCP v. Greenwich Collieries, supra.

I find that although Claimant suffered from numbness and tingling in his hands and fingers, the medical evidence of record, as more fully explicated above, fails to establish that Claimant suffered from HAVS or vibration-induced CTS. In fact, it was opined by Drs. Stokes, George and Fleming that Claimant's symptoms were a result of his diabetic neuropathy. Furthermore, the medical evidence failed to established that this condition was causally

related to his employment with Employer.

Moreover, I find that the medical opinions of Drs. Stokes, George and Fleming, given their paramount qualifications in the field of orthopaedic surgery, vascular medicine and neurology, particularly as their practice relates to the hand and surgery thereof, unequivocally and definitively establish that Claimant does not suffer from HAVS or vibration-induced CTS and that no relationship exists between his injury and his employment with Employer. I further find that Claimant's alleged use of vibratory tools did not cause his injury, nor aggravate, accelerate or combine with an underlying condition to form the basis of his present complaints.

Thus, weighing all of the medical evidence of record, as well as Claimant's credible testimony, I find and conclude that Employer has successfully produced **specific and comprehensive medical evidence**, namely findings which were based on extensive testing and objective medical data obtained through such testing, that refute the existence of HAVS or vibration-induced CTS and any connection between Claimant's injury and his employment.

Thus, after reviewing all of the evidence of record, I find and conclude that Claimant does not suffer from HAVS or vibration-induced CTS and that no causal connection exists between Claimant's diabetic neuropathy and his employment.

Having so concluded, the issues of the nature and extent of Claimant's injury, Section 33 effect, penalties and attorney's fees are rendered moot and need not be addressed in this Decision and Order.

V. ORDER

It is therefore ordered that the claim of Willie J. Steward be **DENIED**.

ORDERED this _____ day of August, 1999, at Metairie, Louisiana.

_____
LEE J. ROMERO, JR.
Administrative Law Judge